91-229

No. ———



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
*Petitioners,*

v.

LOUIS W. SULLIVAN, *et al.*,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In *Dole v. United Steelworkers of America* this Court limited the Office of Management and Budget's authority, under the Paperwork Reduction Act, to the review of federal agency information requests only as they pertain to a "collection of information" by or for the use of the agency. The decision below, however, authorizes the Office of Management and Budget (OMB) to disapprove an agency regulation seeking voluntary compliance by private entities with a civil rights statute, on grounds that this requirement generates information which is available on request, but not collected or used, by the agency. The questions presented are:

1) Whether the decision below extends OMB review into substantive agency regulation contrary to the limits set in *Dole*.

2) Where the Department of Health and Human Services has promulgated a self-evaluation regulation to carry out a civil rights statute, whether OMB may countermand that regulation under the Paperwork Reduction Act, which states that the Act does not increase OMB authority with respect to substantive agency policies "including the substantive authority of any Federal agency to enforce the civil rights laws."

## PARTIES TO THE PROCEEDING

In addition to parties named in the caption, other petitioners are the Coalition of Senior Adults, the Gray Panthers, and the Legislative Council of Older Americans.

Other respondents are Richard G. Darman, Director of the Office of Management and Budget.

There are no entities to be listed pursuant to Rule 29.1.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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The petitioner Action Alliance of Senior Citizens of Greater Philadelphia respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on April 16, 1991.

## OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. A) is reported at 930 F.2d 77 (D.C. Cir. 1991). That ruling upheld the order and judgment of

the district court of May 26, 1987 (App. C, D) which is unreported. A previous decision of the court of appeals, reported at 846 F.2d 1449 (D.C. Cir. 1988), had affirmed the judgment of the district court, but was vacated and remanded by this Court on February 26, 1990. 110 S. Ct. 1329 (App. B). Orders of the court of appeals denying rehearing and suggestion of rehearing en banc of July 25, 1988 are unreported. A previous opinion of the court of appeals, reversing the district court's ruling on petitioners' standing to maintain this action, is reported at 789 F.2d 931 (D.C. Cir. 1986).

## JURISDICTION

The opinion of the court of appeals was entered on April 16, 1991. On June 6, 1991, Chief Justice Rehnquist entered an order extending petitioners' time to file this petition to and including August 14, 1991. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1361 and 42 U.S.C. § 6105.

## STATUTORY PROVISIONS INVOLVED

The Appendix sets out relevant provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-20 (1988) (App. E), the Federal Reports Act of 1942, 44 U.S.C. §§ 3501-09 (1976) (App. F), and the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07 (1988) (App. G).

## STATEMENT

In *Dole v. United Steelworkers of America*, 110 S. Ct. 929 (1990), this Court construed federal paperwork laws to empower the Office of Management and Budget (OMB) to review only those federal agency information requirements which dictate that a person maintain information for an agency or provide information to an agency. At the time it decided *Dole* this Court granted certiorari in this case, vacated a previous court of appeals decision

which had construed the paperwork laws more broadly than *Dole*, and remanded this case for consideration in light of *Dole*. On remand, over a strong dissent, the court of appeals majority distinguished *Dole* and reaffirmed its previous decision that the paperwork laws empower OMB to review an agency requirement affecting information which the agency does not use or collect.

The question presented is whether the majority below properly distinguished *Dole* or eviscerated that decision. Its resolution affects more than dry questions of paperwork review. It affects the power of OMB to countermand the judgment of federal agencies over the way they will enforce laws affecting civil rights, public health and safety, and the environment.

1. This case involves OMB review of a final regulation implementing the Age Discrimination Act of 1975 (ADA). 42 U.S.C. § 6101 (1982). The ADA prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. 42 U.S.C. § 6101. Its enactment arose from Congressional recognition that age discriminatory policies and practices impair the ability of older persons to take full advantage of federally-supported services and benefits. *Id.* The ADA does not apply to employment practices. 42 U.S.C. § 6103(c)(1).

The ADA's prohibitions against discrimination on the basis of age are not self-executing but require implementation through two events. First, the Secretary of Health and Human Services (Secretary) must promulgate general regulations applicable to all federal departments and agencies. 42 U.S.C. § 6103(a)(1). The Secretary proposed general regulations on December 1, 1978, 43 Fed. Reg. 56,428, and published final general regulations on June 12, 1979. 44 Fed. Reg. 33,776 (codified at 45 C.F.R. § 90 (1990)).

The general regulations contain the self-evaluation requirement which is at issue in this case. 45 C.F.R. § 90.43(b) (1990) (App. H). The provision directs each agency to require its recipients to perform a one-time self-evaluation which identifies age distinctions in the recipient's programs, justifies the distinctions or takes corrective action. The information maintained by the recipient remains available on request to the agency and the public for three years. *Id.* Recipient self-evaluation, if used, would address age discrimination in a variety of federally funded programs such as Low Income Home Energy Assistance, community health centers, adult education, vocational rehabilitation and mental health services.

Second, the ADA requires each federal agency to issue regulations specific to its recipients, using the general regulations as a model. 42 U.S.C. § 6103(a)(4). Agency-specific regulations must be consistent with the general regulations and, to assure consistency, must be approved by the Secretary before becoming effective. *Id.*

The Secretary proposed a second set of ADA regulations, specific to HHS, on September 24, 1979, 44 Fed. Reg. 55,109, which repeated the self-evaluation of the general regulations. The Secretary issued final HHS-specific regulations on December 28, 1982. 47 Fed. Reg. 57,858 (codified at 45 C.F.R. § 91). The final rules deleted mandatory self-evaluation, and instead required it only on HHS request in a compliance review or complaint investigation. 45 C.F.R. § 91.33(b). The preamble explained this deletion in a one-sentence reference to the Paperwork Reduction Act. 47 Fed. Reg. at 57,852.

The Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-20 (1988) (PRA), authorizes OMB in certain circumstances to disapprove an agency proposal involving a collection of information by the agency. 44 U.S.C. § 3508.

OMB disapproved the self-evaluation requirement *after* issuance of the general regulations in 1979 and *before* issuance of the HHS-specific regulations in 1982. OMB's disapproval is contained in an unpublished OMB memorandum of February 14, 1980 (App. I). The memorandum did not appear in the public record until petitioners cited its existence in this litigation. *Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449, 1459 n.2 (1988) (Wald, J., dissenting). The self-evaluation requirement in the general rule, although not enforced in light of the OMB memorandum, remains codified at 45 C.F.R. 90.43(b).

2. Petitioners commenced this action in February 1983 against the Secretary and the Director of OMB. The action challenged the Secretary's elimination of the self-evaluation requirement from the HHS-specific regulations as a violation of the consistency requirement of the ADA, 42 U.S.C. § 6103(a)(4), and of the Administrative Procedure Act. 5 U.S.C. § 553 (1988). Jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1361 and 42 U.S.C. § 6105.

On March 19, 1984, the district court dismissed petitioners' challenge to the final HHS regulations for lack of standing, but permitted petitioners to challenge the Secretary's inaction on other proposed agency regulations awaiting the Secretary's approval. On December 28, 1984, the district court dismissed these remaining claims as moot after the Secretary approved, or conditionally approved, proposed regulations of 19 agencies. In a first appeal, the court of appeals held that petitioners alleged sufficient injury to their interests to establish their standing to raise all claims. *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931, 942-43 n.14 (1986).

On remand, the district court granted the government's motion for summary judgment and dismissed the complaint on May 26, 1987. It ruled that the OMB memo-

randum of February 14, 1980 was a valid exercise of authority under the Federal Reports Act, 44 U.S.C. § 3501-09 (1976), that the memorandum rendered unenforceable the self-evaluation requirement of the general regulations, and that the memorandum by itself concluded the need for further proceedings under the APA with respect to both the general and the HHS regulations.

In a second appeal, the court of appeals held that OMB's issuance of the 1980 memorandum rendered the self-evaluation regulation "legally void." *Action Alliance v. Bowen*, 846 F.2d at 1453. It noted that OMB holds the same substantive power under the Paperwork Reduction Act, which was the law in effect at the time of the Secretary's challenged action, as it did under the predecessor to the PRA, the Federal Reports Act. *Id.* It construed OMB authority with respect to a "collection of information" to apply to any general or specific requirement for the establishment or maintenance of records which are to be used or be available for use in the collection of information, whether or not such records are actually submitted to a federal agency. *Id.* at 1453-54. The panel divided over the validity of the Secretary's action under the Administrative Procedure Act.

Petitioners subsequently filed a petition for a writ of certiorari on the question of whether the Paperwork Reduction Act and its predecessor statute authorize OMB to disapprove the self-evaluation requirement at issue in this case. On February 26, 1990 this Court granted the petition, vacated the judgment of the court of appeals and remanded the case for further consideration in light of the decision in *Dole*. 110 S.Ct. 1329, No. 88-849. App. B, 24a.

Following remand, a divided court of appeals once again affirmed the district court. It analyzed the case under the Paperwork Reduction Act, noting the con-

gruence of the superceded Federal Reports Act.[1] The panel majority found the self-evaluation rule to constitute a recordkeeping requirement and a collection of information under the PRA, because the report is available on request to the agency. See App., 6a. It found support for this interpretation under OMB's own regulations. *Id.* at 8a. The court of appeals declined to review its previous conclusion that 44 U.S.C. § 3518(e) does not in any way limit OMB review of the self-evaluation provision as an enforcement measure under a civil rights law, and also declined to review its previous conclusion that HHS' actions fully satisfied the informal rulemaking requirements of the APA. App. 14a & n.7.

Judge Wald, dissenting, concluded that the self-evaluation provision so closely resembles the disclosure provisions at issue in *Dole* as to fall outside OMB review under the PRA. App., 15a. The dissent reaffirmed an earlier finding that the government's actions violated notice and comment rulemaking under the APA. App., 23a n.6.

## REASONS FOR GRANTING THE PETITION

This Court carefully described the parameters of OMB review authority under the Paperwork Reduction Act in its decision in *Dole v. United Steelworkers of America.* The court of appeals decision, if allowed to stand, would significantly expand OMB authority and drain *Dole* of much of its rationale. The court below reached an opposite conclusion on facts controlled by *Dole,* as the dissenting opinion emphasizes. App., 15a.

Not only did the majority misread *Dole,* it pronounced a different view of OMB authority which has far-reaching

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[1] The Secretary promulgated final HHS-specific rules under the Age Discrimination Act on December 28, 1982 when, for the first time, he abandoned the government-wide self-evaluation requirement of 45 C.F.R. 90.43(b). The Secretary cited only the PRA as his basis for so acting. 47 Reg. 57,852.

consequences. Congress cabined OMB power under the paperwork laws, not wanting to fetter agency decisions about statutory enforcement. The court of appeals decision nonetheless extended OMB authority to substantive regulations involving information which is not *collected* by an agency but merely made *available* to it. In so ruling, the court of appeals empowered OMB to countermand agency enforcement of a broad range of labor, environmental and civil rights laws.

1. The court of appeals' decision directly conflicts with *Dole*. In *Dole* this Court considered OMB disapproval of agency requirements under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1982), that employers disclose information about hazardous chemicals in the workplace. It concluded that the PRA does not authorize OMB to review or disapprove such disclosures. *Dole*, 110 S.Ct. at 937. Only when those requirements dictate that a person maintain information *for an agency* does OMB review arise. *Id.* Review of "recordkeeping requirements" under the PRA, moreover, does not extend to an agency's "substantive regulatory choice" for protection of the public, in contrast to an agency's collection of information "useful in performing some other agency function." *Id.*

This case falls squarely under the rationale of *Dole*. It involves a substantive regulatory requirement and it does not involve information collected by an agency, but only information made available to the agency on request. Agency availability of information did not alter the outcome in *Dole*, nor should it here.

The majority decision below undercuts *Dole's* rationale. The decision seizes on the availability of information to the agency, in contrast to the actual *collection* of information by the agency, and turns *Dole* on its head. A requirement of agency availability, so the decision reasons, now empowers OMB to review not only an information

collection but an entire substantive regulation. Once OMB secures a foot in the door it becomes free to roam the entire regulatory structure. The Court of Appeals thus repeated the same broad conclusion it had reached in its pre-*Dole* decision, namely, that a recordkeeping requirement is within OMB review under the PRA even if the record is *not* collected by the agency but instead is maintained by recipients for independent regulatory purposes. *Action Alliance v. Bowen*, 846 F.2d at 1453-54.

Just how the court of appeals' reasoning clashes with *Dole* becomes apparent when that reasoning is applied to the *Dole* setting. For example, *Dole* involved a requirement that "downstream" employers (who use but do not manufacture certain chemicals) first, must develop and maintain a written hazard communication program that describes how the employer will meet various safety standards, 29 C.F.R. § 1910.1200(e)(1), and second, must make this information available to an employee and to the agency on request. 29 C.F.R. § 1910.1200(e)(4). Suppose, in addition, that an employer were required to perform a self-evaluative inspection and to maintain this information under those same standards. This addition of self-inspection to a self-compliance statement does not change the outcome under *Dole*. Yet the majority below, over a vigorous dissent, reached the opposite result: It would treat uncollected safety statements as a collection, and it would allow OMB to countermand the entire hazard communication standard as a consequence.

The result below also conflicts with sound policy underlying the paperwork laws. First, OMB expertise is most relevant to an agency's actual gathering of information and the processing, volume, cost and use which it entails. Second, Congress' desire for an OMB check on an agency's determination of its own paperwork needs does not mean Congress wanted OMB to countermand an agency's enforcement decisions. Third, limiting OMB review to actual collections of information by an agency draws a

bright line around OMB authority; to extend this authority to review of substantive requirements beyond an agency's information collection pushes OMB authority into hazy and unmanageable frontiers.[2]

There are also practical reasons why the availability of information to an agency on request does not confer PRA review. The agency might never request the information, as in the instant case. It might request the information solely in connection with a specific investigation, or from fewer than ten persons, to which the PRA is inapplicable. 44 U.S.C. §§ 3518(c)(1)(B)(ii), 3502(4)(a). Should the agency seek the information in a nonexempt manner, it must secure OMB review and obtain a control number; if it does not, the public may ignore the requirement without risk of penalty. 44 U.S.C. § 3512; 110 S. Ct. at 937.

The court of appeals majority mistakenly attempted to distinguish *Dole* on two grounds. First, it held that the mere *availability* of information to an agency brings recordkeeping within the PRA, App., 8a, despite the fact that *Dole* involved the same provision for agency availability of information on request. See 29 C.F.R. §§ 1910.1200(e)(4) and 1910.1200(g)(11). The majority purported to discern a distinction, however, on the ground that OMB here had not explicitly disapproved the

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[2] The legislative history of the PRA supports this construction. The legislative record does not expressly address the legal effect of recordkeeping, disclosure or other information available to an agency on request. It nowhere suggests, however, that the law should apply to anything other than requirements for information to be provided *to the government and for the government's use. See* S. Rep. No. 96-930 at 8, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 6248 (OMB is "to reduce and minimize the public burden involved in providing information *to the Federal Government*") (emphasis added). See also *id.* at 11 ("[T]he essential purpose of the legislation is "to reduce the burden of the public in providing information *to the Federal Government.*") (emphasis added).

availability requirement. But that issue had become moot. In any event, as Judge Wald noted,

> [I]t surely cannot be the case that simply by disapproving *both* the disclosure and the availability requirements OMB could magically extend its own authority. To allow the tail to wag the dog in this way would render *Dole* meaningless.

App., 19a-20a. (emphasis in original).

Indeed, this Court dismissed the very distinction on which the majority below rested. The government claimed in *Dole* that the recordkeeping requirements were subject to OMB clearance because they were "prepared for the government's use" in that they must be provided to the government "upon request." *Dole*, Petitioner's Brief at 25; Reply Brief at 10-11. But this Court determined that the mere availability of information did not convert it into information subject to OMB review. 110 S.Ct. at 938 n.11.

Second, the majority characterized the self-evaluation requirement here as a compliance record rather than a substantive regulation. App., 9a. But this characterization is inconsistent with the requirement's language and purpose because HHS selected self-evaluation as the most effective technique in redressing the problems of age discrimination.[3] The dissent below illustrates how self-evaluation constitutes the same regulatory choice as the hazard communication program by quoting *Dole* and inserting parenthetical facts from this case:

> An agency charged with protecting employees from hazardous chemicals [read "ending age discrimination"] has a variety of regulatory weapons from

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[3] 43 Fed. Reg. 56,437 (recipients have "primary responsibility for ensuring compliance"); 44 Fed. Reg. 33,785 ("the primary purpose of self-evaluation is internal review by the recipient"). Section 90.43(b) does not actually impose an information requirement on recipients, but directs each federal agency to require its recipients to complete the self-evaluation provision.

> which to choose: It can ban the chemical altogether ["ban certain types of age distinctions"]; it can mandate specified safety measures ["establish goals or timetables"] or it can require labels or other warnings ["require self-evaluation"]. An agency chooses to impose a warning requirement ["a self-evaluation requirement"] because it believes that such a requirement is the least intrusive measure that will sufficiently [fulfill its statutory mandate].

Wald, J., dissenting, App., 16a (quoting 110 S.Ct. at 933) (bracketed material in original).

The court of appeals decision carries a double danger. It threatens to undermine *Dole*. It also gives OMB the very power which Congress wanted to withhold, namely, the power to second-guess the judgment of an agency over how it will enforce the law.

The majority decision below is not only incorrect, it has far-reaching consequences. If left unchanged, the decision would permit OMB to countermand numerous substantive regulatory methods selected by agencies.

OMB reviews all regulatory requirements having paperwork aspects not less than every three years. 5 C.F.R. § 1320.13(i). Under the court of appeals' analysis OMB will be empowered to review all agency requirements for disclosure, labeling, recordkeeping or data-gathering which is not collected by an agency but merely remains available to the agency on request, even though the agency never requests such information, or does so only in a specific investigation which remains exempt from OMB review under § 3518(c)(1)(B)(ii). The court of appeals analysis permits OMB to countermand regulations under an array of laws protecting public health and safety.[4]

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[4] See, e.g., Mine Safety and Health Administration operators' investigation reports, 30 C.F.R. §§ 15.1, 50.40; Federal Trade Commission requirements governing funeral price lists, 16 C.F.R. § 453.6, and labeling of wool, fur and fiber products, 53 Fed. Reg. 5986, 5987

The majority below thought it unnecessary for an agency to retain explicit access to information "on request." An agency could rely instead on its general enforcement powers to obtain records, and even this apparently would fall within OMB review. App., 11a, 12a. But this result completely erases the contours of OMB authority outlined in *Dole*. Resulting uncertainties will be compounded by the opaque nature of OMB review, which is largely invisible to the public and unacknowledged in agency rulemaking. See Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 113 (1987).

2. Equally troubling is the court of appeals' failure to treat the PRA exemption from OMB review of "the substantive authority of any Federal agency to enforce the civil rights laws." 44 U.S.C. § 3518(e).[5] As it stands, the decision permits OMB to disapprove any civil rights enforcement requirement affecting information which is available to an agency on request, even if the agency never seeks the information and even if the requirement serves an independent enforcement purpose. See, e.g., recipient self-evaluations available to the public and to any agency on request under the Rehabilitation Act, 45 C.F.R. § 84.6(c), and Title IX of the Civil Rights Act, 45 C.F.R. § 86.3(c) and (d).

In addition, Congress recognized a special need to secure compliance in the arena of civil rights which can

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(1988); regulation of interstate carrier records under the Food, Drug and Cosmetic Act, 21 U.S.C. § 373; Environmental Protection Agency requirements for vehicle emission control data, 40 C.F.R. § 600.006-86(b)(2), asbestos in school buildings, 40 C.F.R. § 763.93 (g)(3), and water discharge activity, 40 C.F.R. § 122.41(h).

[5] In its previous opinion the court of appeals concluded, without analysis, that § 3518(e) should not be read "to carve so large a slice from OMB's authority." 846 F.2d at 1454-55. On remand the majority opinion declined to review this earlier conclusion. App., 13a-14a.

outweigh the need for paperwork oversight. 126 Cong. Rec. 30,192 (1980) (Remarks of Senator Javits). These concerns led directly to a clarifying amendment to § 3518(e). *Id.* at 30,178 (Remarks of Senator Kennedy and Senator Chiles). Despite the imprecise contours of § 3518(e), its language and purpose lend a natural and logical construction: When OMB paperwork concerns intersect with substantive civil rights law enforcement, the former are subordinated to the latter.

Section 3518(e) is necessarily implicated by *Dole*, which distinguishes an agency's "substantive regulatory choice" from a collection of information for other purposes. 110 S.Ct. at 933. Nonetheless, the decision below accords no significance to § 3518(e). It violates common principles of construction by rendering the statutory provision superfluous. *See Astoria Federal Savings & Loan Assn. v. Solimino*, 111 S.Ct. 2166, 2171-72 (1991). The decision thus exposes a broad range of civil rights enforcement regulations to OMB disapproval contrary to the very paperwork laws from which OMB authority arises.

The decision below creates a risk that lower courts, and OMB itself, will apply PRA review expansively to voluntary compliance and other substantive enforcement measures, even though these measures do not entail information which is used by an agency. Unless corrected, the decision will undermine the rationale of *Dole* and will impede the orderly enforcement of a broad range of civil rights statutes and other laws protecting public health and safety.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued November 30, 1990 Decided April 16, 1991

No. 87-5251

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
*Appellants*

v.

LOUIS W. SULLIVAN, *et al.*

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Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-00285)

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*Burton D. Fretz*, with whom *Toby S. Edelman* and *Bruce M. Fried* were on the brief, for appellants.

*Marleigh D. Dover*, Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney and *William Kanter*, Attorney, Department of Justice, were on the brief, for appellees. *John F. Cordes* and *Richard K. Willard* and *Leonard Schaitman*, Attorneys, Department of Justice, also entered appearances for appellees.

*Robin Talbert* was on the brief for amicus curiae urging that the Court remand the regulations to HHS.

Before: WALD, RUTH B. GINSBURG and WILLIAMS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Dissenting Opinion filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge.* In the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. (1988), Congress sought "to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." *Id.* § 3501(1). The act requires federal agencies to forward to the Office of Management and Budget "a copy of any proposed rule which contains a collection of information requirement." *Id.* § 3504(h)(1). If OMB "determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information." *Id.* § 3508. We here consider whether a regulation vetoed by OMB qualifies as an information collection request, in light of *Dole v. United Steelworkers of America*, 110 S. Ct. 929 (1990).

The Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (1988), made the Secretary of Health and Human Services (actually Health, Education and Welfare, of which a part later became HHS, the term we will use throughout) responsible for promulgating regulations relating to age discrimination. The regulations were to serve as a model for ones to be issued later by each of the various federal agencies that extend federal financial assistance. *Id.* § 6103. HHS published its final model regulations on June 12, 1979. 44 Fed. Reg. 33,776 (1979). Included was a provision under which each adopting agency would require each of its funding recipients "to complete a written self-evaluation of its compliance under the Act . . . [and to] make the self-evaluation available on request to the agency and to the public for a period of 3 years following its completion." 45 CFR § 90.43(b)(1) & (4) (1990). As HHS is itself an

agency that extends federal financial assistance, it then proposed HHS-specific regulations that followed its own model, including the self-evaluation provision. 44 Fed. Reg. 55,108 (1979).

After HHS proposed its agency-specific regulations, but before final adoption, OMB exercised its authority under the Federal Reports Act of 1942, 44 U.S.C. §§ 3501 et seq., predecessor of the Paperwork Act, formally disapproving the self-evaluation provision of the model regulations. See letter from OMB to HHS, dated February 14, 1980, Joint Appendix ("J.A.") 89. HHS then modified the corresponding agency-specific self-evaluation requirement.[1] Under the final HHS-specific regulations a self-evaluation is required only when requested by HHS in conjunction with a compliance review or a complaint investigation. 45 C.F.R. § 91.33(b) (1990).

Action Alliance of Senior Citizens of Greater Philadelphia sued HHS and OMB, claiming among other things that provisions of this sort were not subject to OMB's authority under the Paperwork Act. This court upheld HHS's decision to submit to OMB, and thus indirectly upheld the action of OMB itself. *Action Alliance of Senior Citizens of Phil. v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988). The Supreme Court granted certiorari and remanded to us for further consideration in light of *Steelworkers*, which held the Paperwork Act inapplicable to a hazard labelling and disclosure requirement. *Action Alliance of Senior Citizens of Phil. v. Sullivan*, 110 S. Ct. 1329, 1330 (1990). Because we find no inconsistency between *Steelworkers* and our prior decision, we again uphold HHS's revision of its agency-specific regulations

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[1] Interestingly, HHS never modified the model regulations, *see Action Alliance of Senior Citizens of Phil. v. Bowen*, 846 F.2d 1449, 1455 (D.C. Cir. 1988), though OMB's action drained the self-evaluation component of legal effect, *id.*

to conform with OMB's disapproval of the self-evaluation provision of the model regulations.

* * * *

The parties start with a dispute over whether the case is governed by the Paperwork Act or its predecessor, the Federal Reports Act of 1942, the Alliance arguing for the Paperwork Act, the government for the Reports Act. OMB disapproved of the self-evaluation provision of the model regulations in February 1980, before enactment of the Paperwork Act (December 11, 1980), and well before its effective date (April 1, 1981). But the Alliance challenges the final HHS-specific regulations, which were not promulgated until December 28, 1982, long after the Paperwork Act became effective. On the other hand, the Age Discrimination Act required agencies to follow the model regulation, 42 U.S.C. § 6103 (1988), so a case could be made that the controlling date should be that of OMB's ruling (February 14, 1980) or of HHS's adoption of the model regulations (June 12, 1979).

In the end we think it appropriate to sidestep all this. The primary purpose of the Paperwork Act was to make the government-mandated paperwork law clearer and to eliminate the exemptions from the OMB clearance process enjoyed by certain agencies under the Reports Act scheme. See 126 Cong. Rec. 6212 (1980) (remarks of Rep. Horton); 125 Cong. Rec. 16564 (1979) (remarks of Sen. Danforth). The Paperwork Act introduced little (if any) difference in the type of agency action subject to OMB review, and such change as it makes, on the issue on which the Supreme Court remanded, only tends to improve the government's position. See discussion of relevant provisions of the two acts at page 5, below. (The reason why the parties split as they do is a claim based on 44 U.S.C. § 3518(e), adopted as part of the Paperwork Act, which we resolved against plaintiffs in our prior treatment of the case, *see* 846 F.2d at 1454-55, and which we do not revisit today. See pages 12-14 below.)

Thus we will address the issue under the currently effective Paperwork Act, but also note the congruence of the superseded Records Act.

Under the Paperwork Act, OMB's review authority encompasses all "information collection requests." See 44 U.S.C. § 3507 (1988). The act defines such a request as

> a written report form, application form, schedule, questionnaire, reporting or *recordkeeping* requirement, *collection of information* requirement, or other similar method calling for the collection of information.

*Id.* § 3502(11) (1988) (emphasis added). Thus an agency request is subject to OMB disapproval if it embodies *either* a "recordkeeping requirement" *or* a "collection of information requirement". A "collection of information" is in turn

> *the obtaining or soliciting of facts or opinions by an agency* through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for . . . answers to identical questions posed to, or *identical reporting or recordkeeping requirements imposed on*, ten or more persons . . . .

*Id.* § 3502(4) (emphasis added). And a "recordkeeping requirement" is a "requirement . . . to *maintain* specified records." *Id.* § 3502(17) (emphasis added).[2]

As OMB is the agency entrusted with the administration of the Paperwork Act, *Steelworkers*, 110 S. Ct. at 933, we are required under *Chevron U.S.A., Inc. v.*

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[2] The Reports Act simply defined "information" as

> facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling . . . for answers to identical questions from ten or more persons . . .

44 U.S.C. § 3502 (1976).

*NRDC*, 467 U.S. 837, 842-43 (1984), to uphold its interpretation unless it is barred by Congress's clear expression or is unreasonable. See also *Steelworkers*, 110 S.Ct. at 938.

On its face the phrase "recordkeeping requirement" appears to encompass the draft self-evaluation rule. The rule requires a funds recipient to "complete" the "self-evaluation of its [Age Discrimination Act] compliance" and to "make [it] available on request to the agency and to the public" for a period of three years. 45 CFR § 90.43(b)(4) (1990). Thus it seems to require the recipent "to maintain specific records".

The self-evaluation regulation also appears to fit the "collection of information" definition. The regulation directs funds recipients "to complete a written self-evaluation of [their] compliance under the [Age Discrimination] Act", and to make that report "available on request to the agency and to the public". 45 CFR § 90.43(b)(4) (1990). This appears to be the "soliciting of facts or opinions by an agency through the use of . . . identical reporting or recordkeeping requirements".

The Alliance argues that because "no federal agency has apparently sought to collect information contained in a recipient self-evaluation", Alliance Brief at 15, the self-evaluations are not maintained for agency use, and therefore cannot be "recordkeeping requirements". Even if we assumed that availability to the agency were essential for Paperwork Act review, the self-evaluation regulation meets that test, explicitly requiring the federal funds recipient to "make the self-evaluation available to the agency" as well as to the public. See S. Rep. 1411, 96th Cong., 2d Sess. at 40 ("The term 'recordkeeping requirement' . . . includes information maintained by persons *which may be but is not necessarily provided to a Federal agency*") (emphasis added). Obviously the burden of collecting and maintaining information is not diminished

merely because the agency disdains the information that it forced the private party to create. See 126 Cong. Rec. 6212 (1980) ("this bill provides for the implementation of a very important concept: That the Federal Government should treat information as a resource, not a free good . . . .") (remarks of Rep. Horton). It would be a startling irony if OMB's power were lacking in precisely the case where the need for its exercise was greatest—where an agency compels the costly generation of data that it never bothers to study.

In a closely related argument, the Alliance suggests a distinction between information directly collected by an agency and information merely required to be made available to it on request, claiming that the latter is not encompassed by "collection of information". But by insisting on the information's availability to the relevant agency, the self-evaluation requirement "*solicit*[*s*] . . . facts or opinions . . . through the use of . . . identical reporting or recordkeeping requirements". 44 U.S.C. § 3502(4) (emphasis added).

Moreover, in adopting the Paperwork Act Congress had before it the policy statements and regulations of OMB by which it (and its predecessor) had consistently exercised their Reports Act authority simply on the basis of officially mandated availability to an agency, and the legislative history reflects an intent to maintain (or expand) this prior authority. Thus the Senate Report endorsed prior practice in these terms:

> The 'collection of information' definition does not change the scope of current authority and practice by the Director of OMB and the Comptroller General to promulgate rules and regulations needed to interpret the relationship of certain kinds of information to the definition of collection of information. This practice is presently evident in OMB Circular A-40 and GAO regulations (4 CFR Part 10). Previous edi-

> tions of Circular A-40 and GAO regulations demonstrate how this authority has been used during the 37-year history of the original Federal Reports Act.

S. Rep. 96-930, 96th Cong., 2d Sess. at 39; *see* also *id.* at 13 (reflecting intent in some particulars to expand authority over collection of records by precluding certain formerly arguable limitations). OMB Circular A-40, one of the prior agency interpretations listed, said: "When a person or organization is requested by a Federal agency to collect specific information *to be made available to the agency*, the plan or report form . . . used to collect this information must be regarded as sponsored . . . ." OMB Circular A-40 (revised November 5, 1976), reprinted at J.A. 128, 132 (emphasis added). See also Regulation A, Federal Reporting Services, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943), reprinted in HHS Brief ("[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are *to be used or be available for use* in the collection of information") (emphasis added).

Further, the *Steelworkers* majority itself observed that a requirement of availability to an agency was enough to bring a data-collection regulation under the Paperwork Act. It instanced tax and business records and compliance reports as being among "[t]ypical information collection requests", 110 S. Ct. at 933, and also said that they

> are examples of information provided only indirectly to an agency. In these cases, the governing regulations do not require records to be sent to the agency; they require only that records be kept on hand for possible examination as part of a compliance review.

*Id.* at 933 n.4. Forced availability is enough.

The Alliance's final argument rests on a distinction drawn by the *Steelworkers* opinion between collection of

data for such purposes as determining whether "to initiate enforcement measures", *id.* at 933, and requirements that "represent[] a substantive regulatory choice," *id.* The Alliance believes that the self-evaluation requirement must be substantive because HHS had justified the requirement as "impos[ing] upon recipients a primary responsibility for ensuring compliance with the [Age Discrimination] Act", 43 Fed. Reg. at 56,437, and had stated that its primary purpose was "internal review by the recipient," 44 Fed. Reg. at 33,785. See Alliance Brief at 14-15.

The regulation under review in *Steelworkers* was a "Hazard Communications Standard" issued by the Department of Labor requiring employers to supply all employees in multi-employer sites "with data sheets describing the hazardous substances to which they were likely to be exposed". 110 S. Ct. at 932.[3] As the Court said, the rules "mandat[ed] disclosure by one party *directly to a third party*". See *id.* at 938 (emphasis added). The Court outlined the choices open to the regulating agency as (1) a simple ban on the chemicals in question, (2) a mandate of specific safety solutions such as gloves or goggles, and (3) a system of required warnings and labels. The agency selected disclosure, the Court observed, because it believed "that such a requirement is the least intrusive measure that will sufficiently protect the public." *Id.* at 933.

We do not believe the regulation here is "substantive" as the term is used in *Steelworkers*. It appears both in form ("a written self-evaluation of [the recipient's] compliance") and in function considerably more like the

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[3] "The data sheets were to list the physical characteristics and hazards of each chemical, the symptoms caused by overexposure, and any pre-existing medical conditions aggravated by exposure. In addition, the data sheets were to recommend safety precautions and first aid and emergency procedures in case of overexposure, and provide a source for additional information." *Id.* at 931.

tax records and compliance reports that the Court recognized as covered by the Paperwork Act (see 110 S. Ct. at 933 & n.4) than like the OSHA disclosure rules that it found exempt.

First, we question whether a regulation's "substantive" characterization is relevant at all where, as here, it requires data to be collected and made available to the agency, and both agencies (as well as plaintiffs) have throughout the proceedings treated the regulation as a unit. The Court in *Steelworkers* observed that mandatory agency availability is a feature of what it dubbed "[t]ypical information collection requests". *Id.* at 933. Such requests, it said, "share at least one characteristic: *The information requested is provided to a federal agency, either directly or indirectly.*" *Id.* (emphasis added).[4]

Second, we believe that a standard of conduct is substantive in the sense used by the Court if it fulfills the agency's ultimate statutory goal, *independently* of its tendency to enhance compliance with other norms. By this reading, measures that simply increase the likelihood that regulatees or recipients will comply with standards defined elsewhere are not substantive.[5]

In *Steelworkers*, disclosure directly served the agency's safety purposes. It did so *not* because it enhanced compliance with some other standard, but because the disclosure would enable possible victims of the chemicals' side effects to protect themselves. While the self-

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[4] In *Steelworkers*, the Department of Labor had adopted a requirement of agency availability covering the information to be disclosed to workers, but as OMB did not strike it down, the Court did not address it. *See* 110 S. Ct. at 938 n.11.

[5] While this distinction cannot handle a self-evaluation requirement imposed by an agency charged with enforcing the Greek maxim "Know thyself", we leave that Orwellian hypothetical to another day.

evaluation requirement would also have advanced the substantive goals of the Age Discrimination Act, it would have done so in essentially the manner of tax records and compliance reports—by enhancing compliance with norms defined elsewhere, both by adjusting the regulatees' mindset and by facilitating agency enforcement.

The Court's reading suggests a view that while Congress feared wasteful paper-shuffling in data collections that serve only as a method of inducing compliance, it had less concern (or none) as to data transmissions that directly accomplish the agency's ultimate goal. Indeed, Congress may well have believed that agencies suffered an especially severe temptation to wasteful data collections for compliance enhancement, as these would enable the agencies to shift enforcement costs from themselves to regulated parties.

It is true that *Steelworkers* observed that if " 'reporting and recordkeeping requirement' is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules." 110 S. Ct. at 935. In context, we do not think the Court's contrast can be taken as making agency availability a necessary condition of Paperwork Act coverage. The Court is more sensibly seen as stressing the difference between data that informs the relation between regulatee or fund recipient and agency, and disclosures to a specific class of third parties otherwise likely to be injured by the product described. *See id.* at 934 (requirement that someone "communicate specified data to a third party" is not "soliciting facts").

While this case is easy because of the agencies' agreement that the regulation, including the agency availability requirement, is to be treated as an integral whole, see page 9 above, conditioning OMB's Paperwork Act authority on such a requirement would invite a kind of sham. Agencies could omit any express provision for

availability, relying on their general enforcement powers both to secure access to records whose maintenance they compel, and to penalize the regulatee's failure to create them.

Plaintiffs lay great stress on evidence in the rulemaking record that HHS's purpose in requiring self-evaluations was to advance substantive anti-discrimination goals. We do not doubt it. But, as we said above, the role of the self-evaluations is essentially the same as that of tax and other compliance records—to bring behavior into compliance with substantive standards outside the requirement. The test is a functional one. It does not require OMB (and then a court, in review) to study the context and agency "legislative" history of a regulation to make some elusive finding of its primary or main or important purpose. Not only would such a test be extremely hard to apply, involving a dubious weighing of joint purposes, but it would be readily mainpulated by agencies, enabling them to escape OMB review by larding their regulatory preambles with gratuitous claims of acceptable "substantive" purposes.

Congress and HHS clearly hoped that the Age Discrimination Act would correct discriminatory stereotyping, see, e.g., dissent at 7-8 (citing items from legislative history of the Act), but these hopes do not change the analysis. The link between right conduct and right thinking was observed at least as early as Aristotle: "[W]e become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts." Nichomachean Ethics, Book II, Ch. 1. But neither of the political branches saw attitude change, divorced from conduct change, as an independent regulatory goal. The Act and regulations established norms of substantive conduct, designed to protect older Americans from *behavior* deemed unfair; the agency quite understandably believed that mandatory self-evaluations of compliance with the Act would, like tax and other compliance records, lead to conduct conforming to the prescribed norms.

HHS, we note, made it quite clear that among the purposes of the self-evaluation regulation was one specified by *Steelworkers* as a characteristic of covered information collections, namely, monitoring compliance for purposes of enforcement activity. See *Steelworkers*, 110 S.Ct. at 933. The self-evaluation regulation was promulgated as part of "Subpart D—Investigation, Conciliation and Enforcement Procedures", 45 CFR § 90 Subpart D, and the immediately preceding regulation noted that a funds recipient would have the "responsibility to maintain records, provide information, and to afford access to its records to an agency to the extent required to determine whether it is in compliance with the Act", 45 CFR § 90.42(a).

In sum, because HHS's self-evaluation rule requires a fund recipient to collect data describing its compliance with the norms of the Age Discrimination Act, we find it more akin to the tax and compliance records that are subject to the Paperwork Act than to the disclosure and warning system that *Steelworkers* found exempt.

* * * *

The Alliance also raises two other challenges to the final HHS-specific self-evaluation provision. First, it argues that the self-evaluation provision is exempt from OMB review by virtue of 44 U.S.C. § 3518(e) (1988).[6] Second, it claims that HHS's change in the self-evaluation provision created such a gap between the proposed and final HHS-specific rules as to have obligated HHS to issue a new notice and initiate a new round of comment, in order to satisfy the informal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b)

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[6] The section provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of [OMB] with respect to the substantive policies and programs of departments . . ., including the substantive authority of any Federal agency to enforce the civil rights laws.

(1988). We rejected both arguments in our prior opinion. *Action Alliance*, 846 F.2d at 1454-55 (rejecting the § 3518(e) claim as based on too broad a reading of the statute); *id.* at 1455-56 (finding no new notice necessary in light of the constraint provided by the OMB disapproval).

Although the Supreme Court vacated our prior opinion, *see Action Alliance*, 110 S. Ct. at 1330, it expressed no opinion on the merit of these holdings. They therefore continue to have precedential weight, and in the absence of contrary authority, we do not disturb them. *See, e.g., Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 & n.5 (D.C. Cir. 1990); *U.S. ex. rel. Espinoza v. Fairman*, 813 F.2d 117, 125 n.7 (7th Cir. 1987) (decision vacated by Supreme Court remains persuasive precedent so long as the Court did not reject the lower court decision's underlying reasoning); *Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) ("although vacated, the decision stands as the most comprehensive source of guidance available on the . . . questions at issue in this case."); *County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law. . . .") (citations omitted).[7]

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For the foregoing reasons, the petition for review is denied.

*So Ordered.*

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[7] Judge Ruth B. Ginsburg, who was drawn to replace original panel member Judge Starr, cast no vote on the merits of the § 3518(e) and notice-and-comment issues. She agrees, however, that the remand in *Steelworkers* does not bear on, and therefore should not unsettle, the original panel's resolution of those issues.

WALD, *Circuit Judge*, dissenting: I believe this case is controlled by the Supreme Court's decision in *Dole v. United Steelworkers of America*, 110 S. Ct. 929 (1990). I find that the "self-evaluation requirement" in this case resembles the "hazard communication requirement" at issue in *Dole* closely enough so that *Dole*'s reasoning removes the self-evaluation requirement from OMB review under the Paperwork Reduction Act.

I.

In *Dole*, the Supreme Court reviewed the Office of Management and Budget's ("OMB") disapproval of disclosure requirements under which the Occupational Safety and Health Administration ("OSHA)" required employers to make available to employees extensive information concerning hazardous chemicals in the workplace. *See* 29 C.F.R. § 1910.1200 (1988). The Court ruled that the Paperwork Reduction Act ("Paperwork Act") did not authorize OMB to review or disapprove such disclosures. In doing so, the Court emphasized two aspects of disclosure requirements. First, a disclosure requirement "represents a substantive regulatory choice" that "such a requirement is the least intrusive measure that will sufficiently protect the public." 110 S. Ct. at 933. Second, a disclosure requirement does not involve "an agency's efforts to gather facts for its own use." *Id.* at 934. Because of these two factors, the Court concluded, a disclosure requirement was not an "information collection request" under the Paperwork Act, and therefore was not subject to OMB review.

The self-evaluation requirement at issue in this case bears the same critical features identified by the *Dole* Court. First, the self-evaluation requirement embodies a substantive regulatory choice. Just as OSHA determined that a disclosure requirement was "the least intrusive measure that will sufficiently protect the public," *id.* at 933, so the Department of Health and Human Services ("HHS") determined that a less intrusive weapon in com-

bating age discrimination was to require recipients to take a hard look at their own policies and practices. The parallel between the disclosure and self-evaluation requirements is striking, as the following passage from *Dole, mutatis mutandis*, illustrates:

> An agency charged with protecting employees from hazardous chemicals [read "ending age discrimination" has a variety of regulatory weapons from which to choose: It can ban the chemical altogether ["ban certain types of age distinctions"]; it can mandate specified safety measures ["establish goals or timetables"]; or it can require labels or other warnings ["require self-evaluation"]. An agency chooses to impose a warning requirement ["a self-evaluation requirement"] because it believes that such a requirement is the least intrusive measure that will sufficiently [fulfill its statutory mandate].

110 S. Ct. at 933. Thus, like OSHA's disclosure requirement, HHS' self-evaulation requirement embodies an agency's substantive regulatory choice.

Second, the self-evaluation requirement—again like the disclosure requirement—does not involve "an agency's efforts to gather facts for its own use." *Id.* at 934. Indeed, in promulgating its final rules, HHS (then the Department of Health, Education, and Welfare ("HEW")) directly and expressly rejected suggestions that self-evaluations be used for enforcement purposes.

> *Comment*: Several commenters [on the proposed self-evaluation requirement] stated that all self-evaluations should be subjected to a review . . . . Other commenters suggested that the funding agency spot check recipients' self-evaluations . . . Generally, commenters stated that self-evaluations alone would be insufficient to meet the [Age Discrimination Act ("ADA")] reporting requirements.
>
> * * * *

> *Response*: HEW believes that *the primary purpose of the self-evaluation is internal review by the recipient.*
>
> The self-evaluation process is not intended to yield sufficient information to satisfy the ADA reporting requirements.

44 Fed. Reg. at 33,784-85 (1979) (emphasis supplied). As these remarks clearly demonstrate, HHS intended that the self-evaluation requirement be for the recipient's use, not "for [the agency's] own use." Thus, in this regard as well, the self-evaluation requirement is indistinguishable from the disclosure requirement in *Dole*.

Stated more generally, *Dole* established that OMB's jurisdiction under the Paperwork Act did not extend to information requests that, *taken alone and without further agency action, advance the ends of the relevant statute.*[1] Thus, what distinguishes the disclosure require-

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[1] The Paperwork Act itself expressly provides that

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of [OMB] with respect to the *substantive policies or programs of . . . agencies . . . .*

44 U.S.C. § 3518(e) (emphasis supplied). The government contends that this case is governed by the Federal Reports Act, the predecessor of the Paperwork Act. Like the majority, I need not decide that issue, for I conclude that in all relevant respects the two statutes are identical. Although the Federal Reports Act did not expressly bar OMB's regulation of "substantive policies" as does the Paperwork Act's § 3518(e), Congress clearly intended as much. Indeed, in enacting § 3518(e), Congress noted that

> [t]his provision results from concern that the authority of this Act might be used to increase the power of OMB over substantive policy.
>
> [T]here have been problems along that line in the past. It has been argued that the Federal Reports Act . . . was used to interfere with regulatory policy . . . . Those arguments prompted Congress to remove the independent agencies from

ment in *Dole* from other information requests is that hazard disclosure, *taken alone*, reduces workplace injuries and thus advances the ends of the relevant statute (the OSH Act). The same cannot be said of the standard variety of agency information-collection requests. The collection of receipts or records for tax purposes does not in and of itself generate revenue; it merely facilitates subsequent agency enforcement actions. Similarly, the collection of financial information by license applicants does not, taken alone, ensure that the Federal Communications Commission's licensing requirements will be met; instead such collection is merely "a means of acquiring information useful in performing some *other* agency function," 110 S. Ct. at 933-34 (emphasis supplied), namely, enforcement.

In contrast, HHS's self-evaluation requirement, like the hazard disclosures in *Dole*, is an end in itself. HHS believed that, through self-scrutiny, recipients would begin to recognize and eliminate discriminatory practices. HHS expressly stated that self-evaluations were not a means of combatting discrimination.[2] Given these characteris-

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OMB supervision back in 1973—and place those agencies under GAO.

S. Rep. No. 930, 96th Cong., 2d Sess. 56, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6241, 6296; *see also* H.R. Conf. Rep. No. 924, 93d Cong., 1st Sess. 10-11, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2523, 2533-34. I understand these congressional discussions to indicate that Congress did not intend the Federal Reports Act to allow OMB to control the "substantive policies or programs" of federal agencies.

[2] The idea that critical self-evaluation is an important means of battling discrimination is not novel. Courts, in other contexts, have long recognized the importance of such introspective techniques. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (emphasizing the importance, in title VII actions, of remedies "which cause[] employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of" discrimination); *see also Penk v. Oregon State Board of Higher Education*, 99 F.R.D. 511, 512 (D.

tics, I conclude that the self-evaluation requirement is, for purposes of the Paperwork Act, similar to the disclosure requirement in *Dole*. And, pursuant to *Dole*, I also conclude that such self-evaluations are beyond OMB review under the Paperwork Act.

II.

The majority distinguishes this case from *Dole* on two grounds. The first of these can be dispatched quickly. The majority first suggests that the "requirement of availability to an agency [is] enough to bring a data-collection regulation under the Paperwork Act," Majority opinion ("Maj. op.") at 8, and that such a requirement is present in this case, but was not in *Dole*. Actually, however, there is no real difference between this case and *Dole* insofar as the existence of an agency-availability requirement is concerned. As the majority notes, OSHA regulations *did* require that hazard disclosures—like self-evaluations—be made available to the agency. *See* 29 C.F.R. § 1910.1200(e)(4). The only difference between the two cases, then, is this: while in *Dole* OMB did not explicitly disapprove the agency-availability requirement,[3] in this case, OMB appears to have disapproved both the self-evaluation and the agency-availability requirements.

This distinction cannot plausibly dictate a different outcome from that which the Supreme Court reached in *Dole*. The *Dole* court ruled that OMB did not have jurisdiction to disapprove the disclosure requirement; it surely cannot be the case that simply by disapproving

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Or. 1983) (discussing whether self-evaluations should be discoverable and noting that "candid self-evaluation is probably necessary in order to achieve voluntary compliance with the employment discrimination laws"); *Jamison v. Storer Broadcasting Co.*, 511 F. Supp. 1286 (E.D. Mich. 1981) (same).

[3] OMB did not need to disapprove explicitly the availability requirement because, having disapproved the hazard communication itself, the availability requirement was meaningless.

*both* the disclosure and the availability requirements OMB could magically extend its own authority. To allow the tail to wag the dog in this way would render *Dole* meaningless.

The majority relies most heavily on a second contention: that a self-evaluation is merely a compliance record —no different from, say, tax records. This contention, however, is directly contrary to the language, structure, and purpose of the self-evaluation requirement.

The most obvious evidence that a self-evaluation is not merely an enforcement report is the *name* of the requirement. HHS did not style the requirement as a "compliance report," or a "performance record," but as a "*self-evaluation.*" The label could not be more accurate: the object of the requirement is to have recipients *evaluate themselves.* This plain meaning is reinforced by the structure of the regulation which indicates that HHS did *not* intend the self-evaluation to be an enforcement tool.[4] HHS set forth the procedures for compliance reviews in a separate section (§ 90.44), making no reference there to the self-evaluations. Also, when outlining a recipient's duty to "[p]ermit reasonable access by the agency to . . . sources of information" necessary to determine compliance, HHS again made no mention of the self-evaluations. 45 C.F.R. § 90.45(b).

Moreover, events subsequent to OMB's disapproval of the self-evaluation requirement further indicate that HHS did not intend the self-evaluation requirement to be an enforcement device. After OMB disapproved the self-

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[4] Although one subsection of the disapproved regulation does use the word "compliance," *see* 45 C.F.R. § 90.43(b)(1), that single word does not demonstrate that the purpose and function of the self-evaluation was to enhance agency enforcement. Instead, in context, "compliance under the Act" is merely a shorthand for the contents of the self-evaluation—namely, the "identif[ication] and justif[ication of] each age distinction imposed by the recipient." 45 C.F.R. § 90.43(b)(2).

evaluation requirement, HHS, in an effort to comply with OMB's decision, amended the regulation to provide that self-evaluation would *only* be required in conjunction with an agency enforcement action. *See* 47 Fed. Reg. at 57,860; 45 C.F.R. § 91.33(b). This, it seems to me, clearly indicates that both HHS and OMB understood the original self-evaluations at issue in this case to be something very different from compliance reports.

Finally, as noted, HHS articulated the purpose of self-evaluation as "*internal review by the recipient.*" 44 Fed. Reg. at 33,785 (emphasis supplied). In introducing the regulations, HHS framed the "major issue" as the need to correct "age distinctions [that] may be based on nothing more than stereotypes and misconceptions about the abilities and needs of persons of different ages." 43 Fed. Reg. at 56,428 (1978). As the regulations reflect, HHS believed that one important way to eliminate such stereotypes was through self-evaluations.

In sum, the language, structure, and purpose of the self-evaluation requirement belie the majority's claim that that requirement is nothing more than a compliance record. HHS clearly believed that the self-evaluations, taken alone, would aid in redressing the problems of age discrimination.

III.

Distilled to its essence, OMB's critical error was to substitute its vision of anti-discrimination law for HHS' vision. As illustrated, HHS believed that anti-discrimination law required recipients to modify their attitudes and values, that battling discrimination involved not only barring certain behaviors, but also debunking stereotypes and exposing prejudices. The origins of HHS's vision of anti-discrimination law can ultimately be traced to a federal study mandated by the Age Discrimination Act itself.

> Prior to the enactment of any regulations, the Act required the Commission on Civil Rights to conduct

> a study of age discrimination in federally funded programs and activities. [*See* 42 U.S.C. § 6106.] . . . . The Act also required each affected federal agency to respond to the Commission's findings or recommendations [before promulgating regulations].

43 Fed. Reg. at 56,428. One of the Commission's critical findings was that, in federally funded programs, "*Negative staff attitudes toward older persons predispose program administrators to neglect or avoid serving older persons.*" U.S. Commission on Civil Rights. *The Age Discrimination Study* at 36 (1977) (emphasis in original). Based on the Commission's report, *see* 43 Fed. Reg. at 8,756, and on subsequent hearings, HHS proposed its regulations, including the self-evaluation requirement. As this history indicates, HHS believed self-scrutiny to be an important way of battling "negative [] attitudes" and required self-evaluations as a means—in and by itself—of combatting discrimination.

OMB apparently rejected this vision and imposed upon HHS a different conception of anti-discrimination law. Adopting what might be called a "regulatory" approach to anti-discrimination law, OMB suggested that fighting discrimination is not about changing attitudes or values, but simply about prohibiting certain behaviors. Thus, from OMB's perspective, the only way for HHS to fulfill its statutory mandate is through policing, enforcing, and sanctioning such behavior; self-evaluations must, therefore, be part of these efforts.

The majority defers to OMB's approach to anti-discrimination law. They therefore conclude that self-evaluations cannot "*independently* . . . fulfill[] the agency's ultimate statutory goal," Maj. op. at 10 (emphasis in original), and equate self-evaluations with "tax records and compliance reports [that merely] adjust[] the regulatees' mindset and [] facilitat[e] agency enforcement." *Id.* But such an analysis misses the point: "adjusting the regulatees' mindset" is, at least in HHS' view, what anti-discrimination law is all about.

OMB is the agency charged with enforcing the Paperwork Act and, accordingly, is entitled to significant judicial deference. Nonetheless, if the Supreme Court's decision in *Dole* means anything, it means that when it comes to substantive matters—such as the preferred understanding of anti-discrimination law—the Paperwork Act limits OMB's authority.[5] Whatever the merits of these two visions of anti-discrimination law, *Dole* established beyond doubt that it is not the role of OMB to superimpose its opinion of the "better" view onto agency regulations or to trump an agency's considered, substantive judgment simply because it disagrees with that judgment.

For these reasons, I respectfully dissent.[6]

---

[5] The majority recognizes that Congress and HHS "hoped that the Age Discrimination Act would correct discriminatory stereotyping," but erroneously concludes that "neither of the political branches saw [this objective] as an independent regulatory goal." Maj. op. at 11-12. If by the executive branch the majority means HHS, its conclusion is incorrect: as demonstrated above, the very promulgation of the regulation indicates that HHS understood the revision of attitudes and values to be an "independent regulatory goal." (And under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this court must defer to HHS' reasonable interpretation of the Age Discrimination Act.) If, on the other hand, the majority refers to OMB, its conclusion is also unsound: under *Dole*, OMB must defer to HHS' substantive judgments.

[6] For the reasons set forth in my original dissent, *see Action Alliance of Senior Citizens of Philadelphia v. Bowen*, 846 F.2d 1449, 1458-59 (D.C. Cir. 1988), *vacated*, 110 S. Ct. 1329-30 (1990), I continue to dissent from the majority's treatment and resolution of the notice and comment issue.

## APPENDIX B

SUPREME COURT OF THE UNITED STATES

---

No. 88-849

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
*Petitioners*,

v.

LOUIS W. SULLIVAN, Secretary,
Health and Human Services, *et al.*

---

On Writ of Certiorari to the
United States Court of Appeals
for the
District of Columbia Circuit

---

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Dole* v. *United Steelworkers of America*, 494 U.S. —— (1990).

IT IS FURTHER ORDERED that the petitioners, Action Alliance of Senior Citizens of Greater Philadelphia, et al., recover from Louis W. Sullivan, Secretary, Health and Human Services, et al., Two Hundred Dollars ($200.00) for their costs herein expended.

February 26, 1990

Clerk's costs: $200.00

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 83-0285

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
*Plaintiffs,*

v.

OTIS R. BOWEN, *et al.*,
*Defendants.*

---

[Filed May 26, 1987]

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### MEMORANDUM OPINION

Plaintiffs challenge the implementation of the Age Discrimination Act, 42 U.S.C. §§ 6106-6107 (1982) ("the ADA"), by defendant, the Secretary of Health and Human Services. Certain claims in this action were previously dismissed on the ground that plaintiffs lacked standing, and this Court subsequently ruled that the remainder of the case had become moot. Following plaintiffs' appeal, the United States Court of Appeals for the District of Columbia determined that plaintiffs have standing to pursue all claims raised in this action and remanded the case for further proceedings. *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986).

The procedural, factual, and statutory background of this case is set out fully in the opinion of the Court of

Appeals and the earlier opinion of this Court dated March 2, 1984. It is not repeated here other than as is needed to make the present analysis clear. Presently before the Court are the cross-motions of the parties for summary judgment. For the reasons discussed below, defendants' motion is granted and plaintiffs' motion is denied.

At oral argument on the cross-motions for summary judgment before this Court on May 7, 1987, plaintiffs ("Action Allinace") challenged defendants' ("the Secretary" or "HHS") action to [sic] two bases. First, Action Alliance asserted that HHS violated the provision of the ADA which required that the agency-specific regulations be consistent with the government-wide regulations. ADA § 6103(B)(4). Second, Action Alliance asserted that HHS specific regulations are procedurally defective under § 706 of the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1982) ("APA").

I. The Self-Evaluation Provision

A. Section 6103 of the ADA

The government-wide regulations mandate that each agency require each non-exempt recipient to complete a written self-evaluation of the recipient's compliance with the ADA within 18 months of the effective date of the agency specific regulations. 45 C.F.R. § 90.43 (1979). The self-evaluation must identify and justify each age distinction imposed by the recipient. *Id.* The recipient is required to take corrective and remedial action whenever a self-evaluation indicates a violation of the ADA. *Id.* The self-evaluation must be made available upon request to the agency and to the public for a period of three years. *Id.* The proposed HHS regulations contained the identical provision at 45 C.F.R. § 91.33.

As was required by the Federal Reports Act, 44 U.S.C. § 3509 (1976) ("Reports Act"), the Secretary submitted the final government-wide regulations to the Office of

Management and Budget ("OMB") requesting clearance of the self-evaluation provision. On February 20, 1980, after the government-wide regulations were published on June 12, 1979, and became effective on July 1, 1979, as well as after publication of the Notice of Proposed Rulemaking ("NPRM") of the HHS specific regulations but before their final publication, the Director of the Office of Management and Budget ("OMB") disapproved the self-evaluation provision in a memorandum to the Office of General Counsel for HHS ("the OMB memorandum").

The reasons for the disapproval as stated in the OMB Memorandum were that HHS "failed to show the practical utility of the requirement . . . .", HHS had "not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement . . ." and that OMB was "unable to estimate the burden the requirement would impose since the supporting statement says 'little is known about the number of age policies an average recipient imposes . . . .'" Defendants' Brief at Exhibit D. It was further stated that OMB believed other means existed to satisfy the objective of the self-evaluation provision in a less burdensome and costly fashion. If, however, it was shown at a later date that non-compliance with the law was a serious problem, the request would be reconsidered.

As a result of this determination by OMB, the self-evaluation requirement was changed from the original provision contained in the government-wide regulations and the HHS NPRM. The final HHS rule states that recipients *MAY* be required to undertake self-evaluation as part of a compliance review or complaint investigation conducted by HHS. The final HHS rules give HHS the authority to conduct compliance reviews even in the absence of a complaint. 45 C.F.R. § 91.41(a). The compliance review may be as comprehensive as necessary to determine whether a violation of the ADA and the regulations has occurred. *Id.*

HHS explained in the Federal Register that the change in the HHS final rule was "based upon HHS's determination that to be consistent with the requirements of the Paperwork Reduction Act* of 1980, enacted after the publication of the NPRM, the paperwork burden associated with the self-evaluation provision must be limited to recipients where circumstances indicate—in connection with a compliance review or complaint investigation—the need for the self-evaluation. 47 Fed. Register at 57852 (December 28, 1982).

Action Alliance's first claim with respect to the self-evaluation provision is that the HHS regulations violate § 6103(a)(4) of the ADA because they are inconsistent with the government-wide regulations and consistency between the regulations is a critical element in the enforcement scheme. The Secretary responds that, absent OMB clearance under the Federal Reports Act, the self-evaluation provision of the government-wide regulation was rendered void and unenforceable. Thus, § 6103 (a)(4) must be read to require consistency only with valid and enforceable provisions of the government-wide regulations; therefore, the revision of the HHS regulations does not violate the ADA.

OMB acted within its power under the Federal Reports Act to disapprove the self-evaluation provision of the government-wide regulation. As a result, the self-evaluation provision of the government-wide regulation was rendered unenforceable. There is no inconsistency between any valid provisions of the two sets of regulations which violate the ADA.

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* The Federal Reports Act was amended on December 11, 1984, [sic] by Pub. L. 96-511, 94 Stat. 2812. The Paperwork Reduction Act is the amended version of the Federal Reports Act. At the time of OMB's decision the Federal Reports Act was controlling as the Paperwork Reduction Act did not yet exist. It is therefore unnecessary to decide whether OMB complied with the Paperwork Reduction Act.

The Court finds, based on the plain language of the Reports Act, that the self-evaluation provision constitutes a collection of "information" as defined in § 3502 of the Reports Act. While Action Alliance is correct that the Reports Act does not expressly state that OMB has the power to disturb a duly promulgated regulation, it does expressly require preclearance by OMB of all collections of information. Reports Act § 3509. It further expressly prohibits an agency from engaging in the collection of information "[t]o the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason . . . ." Reports Act § 3506.

Action Alliance argues that the statutorily required determination by the Director that the information is unnecessary was not made here. When read as a whole, however, the OMB memorandum makes clear that this determination was made even though the OMB memorandum does not use the language of the Federal Reports Act but rather uses the "practical utility" language of OMB Circular A-40. Defendants' Brief at Appendix 1.

OMB acted within its congressionally granted authority under the Federal Reports Act. Since the self-evaluation provisions of the government-wide regulations were rendered unenforceable there would be no purpose served in including the self-evaluation provision in the agency-specific regulations. Even assuming *arguendo* that HHS could have done so, it is clear it would not have received clearance by OMB and such provisions, too, would have been rendered meaningless. Accordingly, there is no inconsistency between the government-wide regulations and the HHS regulations with regard to the self-evaluation provision.

B. Section 553 of the APA

Defendants argue that because it did not alter standards of conduct when it deleted the self-evaluation provision from the HHS regulations, HHS was not engaged

in rulemaking; therefore, the notice and comment procedures of the APA did not apply. In support, defendants cite *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984). The Court finds the situation here distinguishable from that in *Alcaraz* and the HHS was engaged in substantive rulemaking when it revised the HHS NPRM and enacted the final HHS regulations.

In *Alcaraz*, the pre-existing statute and the subsequently promulgated agency regulation both required certain action to be taken by the identical persons thus making notice and comment unnecessary since those persons were already bound to comply with the provisions of the statute. Here, in contrast, the entity affected by the OMB decision was the agency itself, while recipients were affected by the subsequently promulgated HHS regulations. Recipients were not bound by the OMB decision and they are entitled to the protections of the APA when agency regulations which govern their behavior are promulgated.

Even so, the Court finds that there was no violation of the APA in this case. Notice of the self-evaluation provision was given in the proposed government-wide regulations and comments were received and considered by HHS at that time. In the NPRM for the HHS regulations it was requested by HHS that comments not be made on the self-evaluation provision again, since that provision was to be included on the basis of the earlier comments received in response to the proposed government-wide regulations. Comments were received on the balance of the provisions of the HHS regulations.

There is no material difference between the HHS proposed regulations, which included the original self-evaluation provision, and the final HHS regulations, with the revised self-evaluation provision, that would have required a supplementary notice and comment period. Under the final HHS regulations, HHS may still require

a recipient to perform a self-evaluation at any time. Contrary to plaintiffs' assertion, there has not been a 'recission' of the self-evaluation requirement. Nor can it be said that the final rule is not a logical outgrowth of the proposed rule. *See American Federation of Labor v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985). Therefore, there has been no violation of the APA.

II. The Compliance Provision

Plaintiffs claim that with the addition of the words "upon request" to the language of the proposed compliance provision HHS has effectively rescinded the compliance requirement and, furthermore, that the HHS regulations conflict with the government-wide regulations in violation of the ADA. The Court finds that the compliance reporting requirement of the HHS regulations is fully consistent with the corresponding requirements of the government-wide regulations.

"In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (citations omitted). The Court finds that HHS has consistently interpreted the provision of the government-wide regulations at 45 C.F.R. § 90.45(a) to require agencies to obligate their recipients to provide compliance information only when requested to do so by an agency. The interpretation is consistent with the language of § 90.45 and also with the parallel provision of § 90.42(a). The "targeted" approach to compliance reporting embodied in 90.34 precludes a reading of § 90.45(a) as anything other than a requirement to provide information when requested to do so by an agency.

There is then no inconsistency between the compliance reporting requirement in the HHS regulations at

§ 90.34(b) and the corresponding provision in the government-wide regulation at § 90.45(a). The HHS specific regulations do not violate the consistency requirement of the ADA. Since the Court finds that the government-wide regulations never contained a mandatory, automatic compliance requirement, HHS has not improperly rescinded or "effectively rescinded" the compliance provision in violation of the ADA.

Judgment will be entered in favor of defendants.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: May 26, 1987

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 83-0285

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, *et al.*,
*Plaintiffs,*

v.

OTIS R. BOWEN, *et al.*,
*Defendants.*

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[Filed May 26, 1987]

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## ORDER AND JUDGMENT

Upon consideration of the parties' cross-motions for summary judgment, supporting and opposing memoranda, the oral arguments of counsel, and the entire record, it is this 26th day of May, 1987,

ORDERED that the motion of defendants for summary judgment be, and hereby is, granted; it is further

ORDERED that the motion of plaintiffs for summary judgment be, and hereby is, denied; and it is further

ORDERED that the complaint of plaintiffs be, and hereby is, dismissed.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
United States District Judge

## APPENDIX E

## PAPERWORK REDUCTION ACT OF 1980

44 U.S.C.

§ 3502. Definitions

* * * *

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

* * * *

§ 3507. Public information collection activities—Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the request for collection of such information—

(1) the agency has taken actions, including consultation with the Director, to—

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which

seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in the Federal Register stating that the agency has made such submission and setting forth a title for the information collection request, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response to the information collection request, and an estimate of the burden that will result from the information collection request; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions, including an explanation thereof, publicly

available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay, the approval may be inferred, and the agency may collect the information for not more than one year.

§ 3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

* * * *

§ 3512. Public protection

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

§ 3518. Effect on existing laws and regulations

* * * *

(c)(1) Except as provided in paragraph (2), this chapter does not apply to the collection of information—

(A) during the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter;

(B) during the conduct of (i) a civil action to which the United States or any official or agency thereof is a party or (ii) an administrative action or investigation involving an agency against specific individuals or entities;

* * * *

(2) This chapter applies to the collection of information during the conduct of general investigations (other than information collected in an antitrust investigation to the extent provided in subparagraph (C) of paragraph (1)) undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

## APPENDIX F

## FEDERAL REPORTS ACT

44 U.S.C.

§ 3502. [Para. 3]

"[I]nformation" means facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

§ 3506. Determination of necessity for information; hearing

Upon the request of a party having a substantial interest, or upon his own motion, the Director of the Bureau of the Budget may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. Before making a determination, he may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

§ 3509. Plans or forms for collecting information; submission to Director; approval

A federal agency may not conduct or sponsor the collection of information upon identical items, from

ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in the collection—

(1) the agency has submitted to the Director the plans or forms, together with copies of pertinent regulations and of other related materials as the Director of the Bureau of the Budget has specified; and

(2) the Director has stated that he does not disapprove the proposed collection of information.

## APPENDIX G

## AGE DISCRIMINATION ACT OF 1975

42 U.S.C.

§ 6101. Statement of purpose

It is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance, including programs or activities receiving funds under chapter 67 of Title 31.

§ 6102. Prohibition of discrimination

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

§ 6103. Regulations

(a) Publication in Federal Register of proposed general regulations, final general regulations, and anti-discrimination regulations; effective date

(1) Not later than one year after the transmission of the report required by section 6106(b) of this title, or two and one-half years after November 28, 1975, whichever occurs first, the Secretary of Health and Human Services shall publish in the Federal Register proposed general regulations to carry out the provisions of section 6102 of this title.

(2)(A) The Secretary shall not publish such proposed general regulations until the expiration of a period comprised of—

(i) the forty-five day period specified in section 6106(e) of this title and

(ii) an additional forty-five day period, immediately following the period described in clause (i), during which any committee of the Congress having jurisdiction over the subject matter involved may conduct hearings with respect to the report which the Commission is required to transmit under section 6106(d) of this title, and with respect to the comments and recommendations submitted by Federal departments and agencies under section 6106(e) of this title.

(B) The forty-five day period specified in subparagraph (A)(ii) shall include only days during which both Houses of the Congress are in session.

(3) Not later than ninety days after the Secretary publishes proposed regulations under paragraph (1), the Secretary shall publish in the Federal Register final general regulations to carry out the provisions of section 6102 of this title, after taking into consideration any comments received by the Secretary with respect to the regulations proposed under paragraph (1).

(4) Not later than ninety days after the Secretary publishes final general regulations under paragraps (a)(3), the head of each Federal department or agency which extends Federal financial assistance to any program or activity by way of grant, entitlement, loan, or contract other than a contract of insurance or guaranty, shall transmit to the Secretary and publish in the Federal Register proposed regulations to carry out the provisions of section 402 of this title and to provide appropriate investigative, conciliation, and enforcement procedures. Such regulations shall be consistent with the final general

regulations issued by the Secretary, and shall not become effective until approved by the Secretary.

(5) Notwithstanding any other provision of this section, no regulations issued pursuant to this section shall be effective before July 1, 1979.

* * * *

## APPENDIX H

## GENERAL REGULATIONS UNDER AGE DISCRIMINATION ACT OF 1975

45 C.F.R.

§ 90.43 What specific responsibilities do agencies and recipients have to ensure compliance with the Act?

(a) *Written notice, technical assistance, and educational materials.* Each agency shall: (1) Provide written notice to each recipient of its obligations under the Act. The notice shall include a requirement that where the recipient initially receiving funds makes the funds available to a sub-recipient, the recipient must notify the sub-recipient of its obligations under the Act.

(2) Provide technical assistance, where necessary, to recipients to aid them in complying with the Act.

(3) Make available educational materials setting forth the rights and obligations of beneficiaries and recipients under the Act.

(b) *Self-evaluation.* (1) Each agency shall require each recipient employing the equivalent of 15 or more full time employees to complete a written self-evaluation of its compliance under the Act within 18 months of the effective date of the agency regulations.

(2) Each recipient's self-evaluation shall identify and justify each age distinction imposed by the recipient.

(3) Each recipient shall take corrective remedial action whenever a self-evaluation indicates a violation of the Act.

(4) Each recipient shall make the self-evaluation available on request to the agency and to the public for a period of 3 years following its completion.

* * * *

## HHS FINAL REGULATIONS UNDER AGE DISCRIMINATION ACT OF 1975

45 C.F.R.

§ 91.33 Assurance of compliance and recipient assessment of age distinctions.

(a) Each recipient of Federal financial assistance from HHS shall sign a written assurance as specified by HHS that it will comply with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) As part of a compliance review under § 91.41 or complaint investigation under § 91.44, HHS may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving Federal financial assistance from HHS to assess the recipient's compliance with the Act.

(2) Whenever an assessment indicates a violation of the Act and the HHS regulations, the recipient shall take corrective action.

## APPENDIX I

[SEAL]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C.

MEMORANDUM

TO:

Terry Dowd
Deputy General Counsel
for Regulations Review
Office of General Counsel
Department of Health, Education,
and Welfare

FROM:

Jim Tozzi
Assistant Director for Regulatory
and Information Policy

SUBJECT:

Request for clearance of Self-Evaluation
Requirement of Government-Wide Age
Discrimination Act Regulations

We have disapproved the request for clearance of the self-evaluation requirement in the government-wide regulations implementing the Age Discrimination Act for the following reasons:

1) The Department has failed to show the practical utility of the requirement;

2) The Department has not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement; and

3) The Department is unable to estimate the burden the requirement would impose since the supporting state-

ment says "little is known about the number of age policies an average recipient imposes. . . ."

We believe the proposed addition of the Age Discrimination Act to the standard assurances used in conjunction with Federal grants and increased publicity of the provisions of the Act will satisfy the objective of the self-evaluation provision in a less burdensome and costly fashion.

Should HEW at a later date, on the basis of compliance reviews, have evidence that non-compliance with the law is a serious problem, we would be amenable to reconsidering this decision.

cc: Flora Carter, HEW

(2)

No. 91-229

# In the Supreme Court of the United States

OCTOBER TERM, 1991

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, ET AL., PETITIONERS

*v.*

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
*Acting Solicitor General*

STUART M. GERSON
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## QUESTION PRESENTED

Prior to April 1, 1981, the Federal Reports Act required, among other things, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved certain provisions of the Secretary of Health and Human Services' general regulations, applicable to all agencies, for compliance with the Age Discrimination Act. The question presented is whether the court of appeals correctly upheld those modifications in light of *Dole* v. *United Steelworkers*, 110 S. Ct. 929 (1990).

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---

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals from which review is sought, Pet. App. 1a-23a, is reported at 930 F.2d 77. That decision upheld the district court's May 26, 1987, order, Pet. App. 25a-32a, and judgment, Pet. App. 33a, which are unreported. Prior decisions of the court of appeals are reported at 846 F.2d 1149 and 789 F.2d 931.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1991. On June 6, 1991, Chief Justice Rehnquist extended the time for filing a petition for

a writ of certiorari to and including August 14, 1991. The petition was filed on August 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Congress enacted the Federal Reports Act of 1942 (FRA), 44 U.S.C. 3501 *et seq.*, to ensure that information needed by federal agencies would be obtained with a minimum burden on business enterprises and other persons required to furnish information. 44 U.S.C. 3501 (1976). Congress assigned the Director of the Bureau of the Budget the responsibility for implementing the FRA and later reassigned that responsibility to the Director of the Office of Management and Budget (OMB).

As of 1979, the FRA required all federal agencies to submit their plans for the collection of information to the Director of OMB for approval. 44 U.S.C. 3509 (1976). The FRA prohibited an agency from conducting or sponsoring the activity unless the Director had "stated that he does not disapprove the proposed collection of information." 44 U.S.C. 3509(2) (1976).

On December 11, 1980, Congress passed the Paperwork Reduction Act of 1980 (PRA), Pub. L. No. 96-511, 94 Stat. 2812, with an effective date of April 1, 1981. The PRA amended the FRA to strengthen the "clearance process." S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). The PRA is basically similar to the FRA, but adds new requirements and sets forth OMB's authority and responsibilities with greater clarity and detail. For example, the PRA, unlike the FRA, requires OMB to file public comments on any agency proposed rule requiring the collection of information and provides that the ultimate decision to

approve or disapprove the request must be made publicly available. 44 U.S.C. 3504(h)(4) and (6). The PRA, but not the FRA, also provides that the Act shall not increase or decrease the authority of OMB "with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws." 44 U.S.C. 3518(e).

2. The Age Discrimination Act, 42 U.S.C. 6101, prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. The ADA is administered by the Secretary of Health and Human Services, whose responsibility it is to issue a set of government-wide regulations. When published, these government-wide regulations are to serve as a model for specific agency regulations by each agency that administers a program of federal financial assistance.

On June 12, 1979, the Secretary of HEW (HHS's predecessor) published final government-wide ADA regulations. 44 Fed. Reg. 33,776. They contained a provision, 45 C.F.R. 90.43(b), stating that all agencies must require a self-evaluation from all recipients of federal aid within a specified time frame. In this self-evaluation, each recipient had to identify and justify each age distinction imposed in the program or activity and make that information available to the government for a period of three years. This information could then be used by the agency in considering further regulatory action, as well as in compliance reviews, investigations, and in preparing reports to Congress. The government-wide regulations also contained a provision stating that each agency must include in its specific regulations "a requirement that the recipient: * * * (a) Provide

to the agency information necessary to determine whether the recipient is in compliance" with the ADA. 45 C.F.R. 90.45. Following the publication of the final government-wide regulations, the Secretary submitted the self-evaluation requirement to the Director of OMB for FRA review.

On September 24, 1979, the Secretary published a notice of proposed rulemaking for agency-specific regulations implementing the ADA with respect to financial assistance programs administered by HHS. 44 Fed. Reg. 55,108. The proposed regulations included a provision, patterned on the requirements of the general regulations, that would have required all recipients of federal financial assistance under programs administered by HHS to complete a self-evaluation within 18 months of final promulgation of the HHS-specific regulations. 44 Fed. Reg. 55,115 (1979). The explanatory statement accompanying the proposed HHS-specific regulations stated that the self-evaluation provision was taken from the government-wide regulation. The proposed regulation also provided that each recipient would make available to the Secretary upon request "information necessary to determine whether the recipient is complying with the Act."

On February 14, 1980, OMB exercised its authority under the FRA to disapprove the general government-wide regulations' self-evaluation requirement. Pet. App. 3a, 45a-46a. OMB explained that HHS had "failed to show the practical utility of the requirement," that HHS had "not looked at alternative methods to heighten awareness of the provisions of the Act without levying a record-keeping requirement," and that OMB was "unable to estimate the burden the requirement would impose since the supporting statement says that 'little is known about

the number of age policies an average recipient imposes.' " *Id.* at 45a-46a. OMB further stated that it believed that other means existed to satisfy the objective of the self-evaluation provision that would not be burdensome or costly; however, if it were shown at a later date that noncompliance with the ADA was a serious problem, it would reconsider the request. *Id.* at 46a. OMB's disapproval had the effect of invalidating the general government-wide self-evaluation requirement. See 44 U.S.C. 3506 (1976).

HHS published its final HHS-specific regulations on December 28, 1982. 47 Fed. Reg. 57,850. Because HHS's general regulations were to serve as the model for the agency-specific regulations and since OMB had disapproved the general regulations' mandatory self-evaluation requirement, HHS modified its proposed agency-specific self-evaluation requirement to comport with OMB's disapproval. The final regulation required a self-evaluation only when HHS requested it in connection with a complaint or investigation or compliance review. See 45 C.F.R. 91.33(b).[1]

3. a. Petitioners brought this action in the United States District Court for the District of Columbia to challenge the HHS-specific regulation. They argued that the regulation violated the ADA by adopting discretionary self-evaluation and collection of information requirements.[2]

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[1] HHS explained that this change was necessary in order "to be consistent with the requirements of the Paperwork Reduction Act of 1980." 47 Fed. Reg. 57,852 (1982). OMB had disapproved the general regulations pursuant to its authority under the FRA, but the FRA had since been replaced by the PRA, and HHS accordingly cited that statute.

[2] Petitioners also alleged that the regulations were procedurally deficient under the APA. The district court and the

The district court rejected that claim. The court concluded that OMB acted within its authority under the FRA when it disapproved the self-evaluation provision of the government-wide regulation, Pet. App. 29a, and the self-evaluation provision of the government-wide regulation was thus rendered unenforceable. The court therefore concluded that there was no inconsistency between the HHS-specific regulation and any valid provision of the government-wide regulation.

The court of appeals affirmed. 846 F.2d 1449 (D.C. Cir. 1988). The court agreed that OMB acted within its authority under the FRA in disapproving the general regulation's mandatory self-evaluation requirement and that, since the disapproval denied legal effect to the provision, there was no inconsistency between the government-wide and the HHS-specific regulations. *Id.* at 1453.

Petitioners subsequently filed a petition for a writ of certiorari seeking review of the question of whether the FRA and the PRA authorized OMB to disapprove the self-evaluation requirement at issue in

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court of appeals rejected that claim. 846 F.2d 1449, 1455-1456 (D.C. Cir. 1988). The court of appeals adhered to that conclusion after its initial decision was vacated by this Court and remanded for reconsideration in light of *Dole* v. *United Steelworkers*, 110 S. Ct. 929 (1990). Pet. App. 13a-14a. Petitioners have not renewed that claim in this Court.

The government initially moved to dismiss petitioners' claims on the ground that they had not alleged sufficient injury to their interests to establish their standing to bring this lawsuit. The district court adopted the magistrate's recommendation that petitioners lack standing to challenge the HHS regulations, but the court of appeals reversed and remanded the case to the district court for further proceedings. 789 F.2d 931 (D.C. Cir. 1986).

this case. The Court granted the petition, vacated the court of appeals' judgment, and remanded for reconsideration in light of *Dole* v. *United Steelworkers, of America*, 110 S. Ct. 929 (1990). 110 S. Ct. 1329 (1990); Pet. App. 24a. In *Steelworkers*, the Court held that OMB had improperly reviewed, under the PRA, the public disclosure provisions of the Department of Labor's hazard communication standard.

On remand, the court of appeals, by a divided vote, found no inconsistency between *Steelworkers* and its prior ruling and again upheld OMB's authority to review the regulations. Pet. App. 1a-23a. The court held that information which is required to be maintained for possible use by the agency is a "collection of information" within the meaning of the PRA. Responding to petitioners' argument that *Steelworkers* held that the PRA did not authorize OMB to review an agency's substantive regulatory choices, the court of appeals questioned whether a regulation's "substantive" characterization is relevant at all where, as here, it requires data to be collected and made available to the agency. *Id.* at 10a. In any event, the court said that a regulation is substantive in the sense used by the Court in *Steelworkers* only if it fulfills the agency's ultimate statutory goal. *Ibid.* Since the self-evaluation would have advanced the goals of the ADA only by enhancing compliance with norms defined elsewhere in the ADA, the court held, the provision was subject to OMB review. *Id.* at 12a-13a.[3]

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[3] Judge Wald dissented. Pet. App. 15a-23a. She concluded that the self-evaluation requirement at issue in this case was not materially different from the hazard disclosure requirement at issue in *Steelworkers*. *Ibid.*

## ARGUMENT

Petitioners challenge the provision of the HHS-specific regulation at 45 C.F.R. 91.33(b), which requires a recipient to complete, upon request by HHS, a written self-evaluation of any age distinction imposed on the recipient's federally assisted program or activity. As the district court correctly recognized, the change to a discretionary self-evaluation provision from an automatic one was the result of a binding decision issued by the Office of Management and Budget under the Federal Reports Act. The OMB decision rendered the self-evaluation provision of the government-wide regulation void and unenforceable. The automatic self-evaluation provision thus could not have been implemented after the OMB decision and, therefore, the discretionary self-evaluation provision did not conflict with any valid and enforceable provision of the government-wide regulation, as the petitioners argued below.

Contrary to petitioners' current contention, OMB's disapproval of the across-the-board self-evaluation requirement in the government-wide proposed regulation was a valid exercise of its authority under the FRA, the statute then in effect. The provision required that recipients be instructed to collect and analyze information regarding age distinctions imposed in their particular programs or activities and make that information available to the government. Because the provision required the collection of information by recipients for the government's use, it was subject to the review provisions of the FRA.

The court of appeals' decision that the material at issue here was collected for the government's use is fully consistent with this Court's decision in *Steel-*

*workers* and does not conflict with the decision of any other court. Accordingly, further review is not warranted.

1. Petitioners assert that the court of appeals' decision directly conflicts with *Steelworkers*. That claim lacks merit. Nothing in *Steelworkers* suggests that the Director of OMB improperly exercised his authority under the FRA to review the across-the-board, automatic self-evaluation provision of the government-wide regulation.

The PRA authorizes the Director of OMB to review and disapprove "collection of information" requirements. In *Steelworkers*, OMB sought to review and disapprove three provisions of OSHA's hazard communication rule which required regulated employers, *inter alia*, to collect material safety data sheets (MSDS) with respect to all hazardous substances in the workplace and make them available to employees. These MSDSs were prepared by the manufacturers of the hazardous substances and were required to be transmitted to employers along with the hazardous substances. Employers were not required to add any information to the MSDSs, but were merely required by the OSHA rule to have them present on the work site or exchange them with other employers.

The union challenged the action. The Third Circuit held that OMB had exceeded its authority in disapproving the three provisions both because the PRA does not extend to requirements to disclose information to third parties and because, in its view, the three provisions embodied substantive decision-making entrusted to the agency. The Third Circuit, however, expressly distinguished the issue in that case from the "collection of information" question that is at issue here. It noted, citing the D.C. Circuit's opinion

in the prior appeal, that it was "not presented with the question whether the Paperwork Reduction Act of 1980 applies when the federal government requires from non-governmental parties, for its own purposes, compilation but not transmission of information." *United Steelworkers* v. *Pendergrass*, 855 F.2d 108, 112 (3d Cir. 1988).

This Court affirmed on the ground that the PRA did not apply to third-party disclosures. The Court focused on the statutory term "collection of information," which the PRA defines as "the obtaining or soliciting of facts or opinions by any agency through * * * reporting or recordkeeping requirements." 44 U.S.C. 3502(4). See *Steelworkers*, 110 S. Ct. at 934. In considering whether the three OSHA provisions disapproved by OMB involved a "collection of information," the Court distinguished between "information gathering" and "disclosure" rules. *Id.* at 934, 936-937. The Court recognized that information-gathering rules represent the "[t]ypical information collection requests," and include such items as "compliance reports and tax or business records," which the agency might collect, among other reasons, "for signs or proof of nonfeasance to determine when to initiate enforcement measures." *Id.* at 933. Whatever the nature of the specific rule, however, "[t]hese information requests share at least one characteristic: The information requested is provided to a federal agency, either directly or *indirectly*." *Ibid.* (emphasis added). To explain what it meant by information being provided "indirectly" to the government, the Court explained that, *id.* at 933 n.4 (emphasis added):

> Tax and business records are examples of information provided only indirectly to an agency.

> In these cases, the governing regulations do not require records to be sent to the agency; they require only that records be kept on hand for *possible* examination as part of the compliance review.

In *Steelworkers*, however, the Court found that the three disapproved provisions of the hazard communication rule were not information-gathering rules, but were instead disclosure rules. "By contrast [to information-gathering rules], disclosure rules do not result in information being made available for agency personnel to use." 110 S. Ct. at 933. Disclosure rules, such as the three disapproved OSHA provisions, "require disclosure to a third party rather than to a federal agency." *Id.* at 937. Based on its review of the PRA, which like the FRA refers to the "obtaining or soliciting of facts *by an agency*," the Court concluded that "Congress did not intend the Act to encompass these or any other third-party disclosure rules." *Id.* at 934.

Applying the *Steelworkers* analysis, the court of appeals correctly considered whether the self-evaluation provision "requir[ed] information to be sent or made available to a federal agency" (in which case OMB review would be necessary) or, alternatively, whether the self-evaluation provision "mandated disclosure by one party directly to a third party" (in which case OMB would have no review authority). See *Steelworkers*, 110 S. Ct. at 935, 938. Noting that the proposed rule "requires a funds recipient to 'complete' the 'self-evaluation of its [Age Discrimination Act] compliance' and to 'make [it] available on request to the agency and to the public' for a period of three years," the court of appeals held that proposal fell within the definition of a "record-

keeping requirement." Pet. App. 6a. In addition, because the "regulation directs funds recipients 'to complete a written self-evaluation of [their] compliance under the [ADA],' and to make that report 'available on request to the agency * * *,'" *ibid.*, the regulation was also a "collection of information" within the meaning of the PRA because it "solicit[ed] facts or opinions by an agency through the use of * * * reporting or recordkeeping requirements," 44 U.S.C. 3502(4).

2. Petitioners argue that because 45 C.F.R. 90.43 does not demand the automatic submission of written evaluations, but only that they be submitted upon request, the rule cannot be deemed a "collection of information." Pet. 8-10. As this Court recognized in *Steelworkers*, however, information that is required to be kept on hand for possible examination by the agency is a "collection of information." 110 S. Ct. at 933 n.4. Indeed, a stated purpose of the FRA and the PRA was to obtain information needed by the government with the minimum burden on the government as well as on those required to provide the information. 44 U.S.C. 3501. That purpose is best served by having agencies require recipients to maintain records and provide information as the need arises and they are able to process it. Moreover, the requirement that recipients maintain information for a period of three years makes sense only if it is understood that at some point the information could be collected and examined by the agency. Since 45 C.F.R. 90.43 anticipates the "collection of information," it is subject to the PRA. As the court of appeals recognized, "by insisting on the information's availability to the relevant agency, the self-evaluation requirement '*solicit*[*s*] * * * facts or opinions * * *

through the use of * * * identical reporting or record-keeping requirements.' 44 U.S.C. § 3502(4) (emphasis added)." Pet. App. 7a.

In a closely related argument, petitioners suggest that mere "availability" does not confer paperwork review authority on OMB, because a federal agency might never request the information or might request it from fewer than ten persons. But even assuming that the agency did not ask for the information, the court of appeals correctly observed that "the burden of collecting and maintaining information is not diminished merely because the agency disdains the information that it forced the private party to create. * * * It would be a startling irony if OMB's power were lacking in precisely the case where the need for its exercise was greatest—where an agency compels the costly generation of data that it never bothers to study." Pet. App. 6a-7a.

3. Petitioners contend that the self-evaluation requirement falls outside OMB's review authority since it can heighten recipients' awareness of their responsibilities under the ADA and is, therefore, a substantive regulatory choice, rather than a paperwork requirement. That claim rests on a single sentence in *Steelworkers* noting that the "promulgation of a disclosure rule is a final agency action that represents a substantive regulatory choice." 110 S. Ct. at 933. But "[t]his statement, like all others in [the Court's] opinions, must be taken in the context in which it was made." *Air Courier Conference* v. *American Postal Workers Union*, 111 S. Ct. 913, 920 (1991). The immediately preceeding sentence establishes the test for recognizing a disclosure rule: "[D]isclosure rules do not result in information being made available for agency personnel to use." *Steelworkers*, 110 S. Ct. at 933. The test announced by this Court in *Steel-*

*workers* was, therefore, not whether agency action involved a substantive regulatory choice, but whether information would be provided to a federal agency—either directly or indirectly—rather than to a third party. While the court below questioned whether a "regulation's 'substantive' characterization is relevant at all where, as here, it requires data to be collected and made available to the agency," Pet. App. 10a, the court held that, in any event, a standard of conduct is substantive in the sense used by this Court in *Steelworkers* only "if it fulfills the agency's ultimate statutory goal, *independently* of its tendency to enhance compliance with other norms." *Ibid.* The substantive regulatory choice referred to in *Steelworkers* was how best to protect workers from the effects of hazardous substances. OSHA decided to protect workers by requiring that MSDSs, which disclose information regarding the hazardous chemicals, accompany the products so that the information would be accessible to workers on the job site. By contrast, in this case the self-evaluation is not a "substantive regulatory choice" since it does not fulfill the agency's goal of non-discrimination independently of its tendency to enhance compliance with previously established standards.

In any event, petitioners err in asserting that an information collection requirement that serves a regulatory purpose is exempt from OMB review. What legitimate collection of information does not serve a regulatory purpose? The exception petitioners suggest would swallow the rule and is not supported by *Steelworkers*. A paperwork requirement is not stripped of its character as an information collection request merely because it serves to inform the public. Although tax forms "educate" the public

about their tax obligations, they nevertheless constitute information collection requests. Indeed, in *Steelworkers* this Court expressly recognized that tax and business records constitute typical information collection requests. 110 S. Ct. at 933 n.4. As the court of appeals held in this case, the self-evaluation requirement was "both in form * * * and in function considerably more like the tax records and compliance reports that the Court recognized as covered by the Paperwork Act * * * than like the OSHA disclosure rules that it found exempt." Pet. App. 9a-10a.[4]

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[4] The proposed mandatory self-evaluation provision at issue here was contained in Subpart D of the HHS government-wide regulations, which was entitled "Investigation, Conciliation and Enforcement Procedures." 45 C.F.R. Pt. 90. Before setting forth the specific responsibilities imposed on recipients to ensure compliance with the ADA, HHS broadly stated the recipient's compliance responsibilities, in terms that made plain the law-enforcement and information-collection aspects of the provisions contained in Subpart D:

> A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Age Discrimination Act and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford access to its records to an agency to the extent required to determine whether it is in compliance with the Act.

45 C.F.R. 90.42(a). This emphasis on law enforcement and information collection finds specific expression in the mandatory self-evaluation provision found at 45 C.F.R. 90.43(b), which would have mandated that recipients (1) prepare compliance reports based on information collected in response to two uniform questions—what age distinctions are made in recipients' programs and how are they justified—and (2) keep those compliance reports on hand and available for inspection by the government as part of a compliance review. 45 C.F.R. 90.43(b)(1)-(2) and (4).

Petitioners insist that the self-evaluation form is not a compliance record because the preamble to the regulation included a statement that the purpose of the requirement was to have the recipients perform an internal review. Pet. 11. As the court of appeals recognized, such a test would be extremely difficult to apply, and could "be readily manipulated by agencies, enabling them to escape OMB review by larding their regulatory preambles with gratuitous claims of acceptable 'substantive' purposes." Pet. App. 12a. Congress, however, wisely adopted an objective test for FRA and PRA coverage, one that can easily be applied by all concerned parties. A "collection of information" [5] involves "the obtaining or soliciting of facts or opinions by an agency through the use of * * * reporting or recordkeeping requirements * * * calling for * * * answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons." 44 U.S.C. 3502(4). If the information request satisfies this test, it constitutes a "collection of information," regardless of the agency's subjective rationale for collecting the information.

4. Finally, petitioners contend that the PRA does not apply to civil rights law enforcement. The short answer to petitioners' claim is that the PRA does not apply to the recission in this case, and the section on which they rely is not found in the FRA. In any event, petitioners' claim lacks merit.

The sole basis for their contention is 44 U.S.C. 3518(e) (Supp. IV 1980), which reads as follows:

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[5] The FRA contains a definition of "information" rather than a definition of a "collection of information." See 44 U.S.C. 3502 (1976).

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

The distinction drawn in 44 U.S.C. 3518(e) is not between civil rights laws and other types of laws, but rather between "paperwork management and substantive decisions." S. Rep. No. 930, *supra*, at 56.[6] If, as petitioners claim, civil rights laws were totally exempt from the paperwork management aspects of the Paperwork Reduction Act of 1980, there would have been no need to mention such laws in 44 U.S.C. 3518.[7] As the court of appeals held in its prior opin-

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[6] To carry out its mandate to determine whether a proposed collection of information is "necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency," 44 U.S.C. 3504(c)(2), the Director of OMB must, as discussed above, decide whether the proposed information collection requirement is necessary to accomplish the substantive statutory purposes of the regulatory agency. It is, however, the agency's own substantive policies that define the "proper performance of the functions of the agency."

[7] In addition, Congress expressly stated that information collection associated with the enforcement of civil rights laws and with the administration of federal grant programs were significant factors contributing to the overall paperwork burden. Thus, the legislative history clearly supports the conclusion that record-keeping requirements imposed under any law, including those imposed on recipients of federal funds under any civil rights laws, must conform to the policies of the PRA. Senator Javits, for example, indicated that he anticipated that information collection requests from civil

ion, petitioners' "view of § 3518(e) would completely exempt any civil rights activity from OMB's data collection supervision; § 3518(e)'s language is inadequate to carve so large a slice from OMB's authority." 846 F.2d at 1455.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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rights agencies would be subject to PRA review: "I have no objection to OMB reviewing information requests from civil rights or any other agencies to assure that the information is collected in the least burdensome manner consistent with the statutory purpose, and is not duplicative." 126 Cong. Rec. 30,192 (1980).

* The Solicitor General is disqualified in this case.

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